

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 17, 2007

**TIMOTHY R. BOWLES v. STATE OF TENNESSEE,  
RICKY J. BELL, Warden**

**Direct Appeal from the Criminal Court for Davidson County  
No. 96-C-1534 Mark J. Fishburn, Judge**

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**No. M2006-01685-CCA-R3-HC - Filed May 1, 2007**

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The Petitioner, Timothy R. Bowles, appeals from the habeas court's denial of his petition for habeas corpus relief. The Petitioner alleges on appeal that he is entitled to relief because his trial counsel was ineffective and because his sentence is unconstitutional under Blakely v. Washington. After reviewing the record and applicable law, we find no error in the judgment of the habeas court and affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the Appellant, Timothy R. Bowles.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Dan Hamm, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**I. Facts**

This appeal arises from the habeas court's denial, after a hearing, of the Petitioner's petition for habeas corpus relief. The Petitioner was originally convicted in 1997 of especially aggravated burglary, aggravated rape, robbery, aggravated burglary, and attempted rape. The Petitioner was sentenced to serve his fifty-year sentence at one-hundred percent. The Petitioner alleged in the habeas court that his trial counsel failed to object to the filing of a notice of enhancement factors and failed to request a continuance to address those enhancement factors. The Petitioner argued that, as a result, he suffered a procedural default, which, under federal law, would entitle him to habeas corpus relief. Additionally, the Petitioner alleged his sentence was in violation of Blakely v.

Washington, 542 U.S. 296 (2004).

The State successfully argued in the habeas court that issues of ineffective assistance of counsel may only be addressed via a post-conviction petition, which was previously filed and ruled on. See Timothy R. Bowles v. State, No. M2003-01740-CCA-R3-PC, 2004 WL 1656476 (Tenn. Crim. App., at Nashville, July 23, 2004), *perm. app. denied* (Tenn. Dec. 20, 2004). The State did not specifically address the Blakely issue, but the habeas court nevertheless ruled in favor of the State and denied the petition. It is from this decision that the Petitioner appeals.

## **II. Analysis**

On appeal, the Petitioner raises the same arguments that were raised in the habeas court. First, he argues that the state cannot restrict the right to bring a habeas petition in state court that could be brought in federal court. Thus, despite clear law to the contrary, his claim for ineffective assistance of counsel should be heard and decided in his favor. Second, he argues that he is entitled to relief due to the unconstitutionality of the sentencing process, pursuant to Blakely v. Washington, 542 U.S. 296 (2004). We will discuss these issues in turn.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Although the right is guaranteed in the Tennessee Constitution, the right is governed by statute. T.C.A. § 29-21-101 (2006) *et seq.* The determination of whether habeas corpus relief should be granted is a question of law and is accordingly given de novo review. Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000). Although there is no statutory limit preventing a habeas corpus petition, the grounds upon which relief can be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). It is the burden of the petitioner to demonstrate by a preponderance of the evidence that “the sentence is void or that the confinement is illegal.” Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). In other words, the very narrow grounds upon which a habeas corpus petition can be based are as follows: (1) a claim there was a void judgment which was facially invalid because the convicting court was without jurisdiction or authority to sentence the defendant; or (2) a claim the defendant’s sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). In contrast, a voidable judgment is “one that is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity.” Taylor, 995 S.W.2d at 83; see State v. Richie, 20 S.W.3d 624, 633 (Tenn. 2000).

First, we observe that a claim that the Petitioner did not receive the effective assistance of counsel is a claim that one’s conviction is voidable, not void, because it requires the introduction of evidence from outside the record. See Luttrell v. State, 644 S.W.2d 408, 409 (Tenn. Crim. App. 1982). Thus, it is not a cognizable claim in a habeas proceeding in Tennessee. *Id.* The Petitioner cites two Sixth Circuit cases which address the “cause and prejudice” test for a federal court to hear a habeas case which would otherwise be procedurally defaulted. See Lucas v. O’Dea, 179 F.3d 412 (6th Cir. 1999); Gravley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996). However, this “cause and prejudice” test is used when one wishes to assert a habeas claim in federal court that would otherwise be procedurally defaulted or barred because it was previously addressed in state court. See Lucas,

179 F.3d at 418 (“In the absence of ‘cause’ and ‘prejudice,’ federal courts are barred from undertaking a habeas corpus review of state-court decisions that rest on independent and adequate state grounds.”). We fail to see how the “cause and prejudice” test applies to the case under submission. Here, the Petitioner raised his ineffective assistance of counsel claim via a post-conviction petition, where it rightfully should be brought. Now he wishes to have the same issue addressed via a habeas corpus petition. We cannot agree that the constitution requires us to entertain an ineffective assistance of counsel claim because the Sixth Circuit allows some habeas corpus claims even when they are procedurally defaulted. Thus, the Petitioner is not entitled to relief on this issue.

Second, the Petitioner asserts that he is entitled to relief due to his sentencing not being in conformity with the requirements of Blakely v. Washington.<sup>1</sup> See 542 U.S. 296 (2004). Here, the Petitioner was convicted in 1997 of numerous crimes. The Petitioner alleges the trial court enhanced his sentence based on his finding that:

(1) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great[;] (2) the defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense[; and] (3) the defendant had no hesitation about committing a crime when the risk to human life was high.

We addressed a similar issue in James R.W. Reynolds v. State, and concluded:

The Defendant’s argument has no merit. First, the argument fails because even if there was a violation of the Defendants constitutional right at the time of conviction and sentencing, such violation would render the judgment voidable, and not void, unless the face of the record establishes that the trial court did not have jurisdiction to convict or sentence the Defendant. Secondly, the Blakely holding is not to be applied retroactively and is thus inapplicable to the Defendant’s case.

No. M2004-02254-CCA-R3-HC, 2005 WL 736715, at \*2 (Tenn. Crim. App., at Nashville, Mar. 31, 2005) (citing Earl David Crawford v. State, No. M2004-02449-CCA-R3-HC, 2005 WL 354016, at \*1 (Tenn. Crim. App., at Nashville, Feb. 15, 2005)), *perm. app. denied* (Tenn. Oct. 10, 2005). Because the Petitioner’s Blakely claim would merely make his conviction voidable, not void, he is not entitled to relief. Additionally, we have previously determined that Blakely is not to be applied retroactively to cases already determined final on direct appeal. See Branch v. State, No. W2003-030420CCA0R3-PC, 2004 WL 2996894, at \*9-10 (Tenn. Crim. App, at Jackson, Dec. 21, 2004) (addressing issue via petition for post-conviction relief), *perm. app. denied* (Tenn. May 23, 2005);

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<sup>1</sup>We observe that the Tennessee Supreme Court’s decision in Gomez v. State, 163 S.W.3d 632 (Tenn. 2005), was recently vacated and remanded by the United States Supreme Court. See Gomez v. Tennessee, — S.Ct. —, 2007 WL 505800, at \*1 (2007). Because we conclude the Petitioner has not alleged his convictions or sentences are void, and the Blakely rule does not apply retroactively, we need not address the Petitioner’s Blakely claim on the merits.

Carl Johnson v. State, No. W2003-02760-CCA-R3-PC, 2005 WL 181 699, at \*4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied* (Tenn. June 27, 2005). Thus, the Petitioner is not entitled to relief on this issue.

### **III. Conclusion**

\_\_\_\_\_ In accordance with the foregoing reasoning and authorities, we affirm the judgment of the habeas court.

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ROBERT W. WEDEMEYER, JUDGE